Supreme Court, U.S.
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NO. _____

In The Supreme Court of the United States

JOHN MICHAEL BORNEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA;
RICHARD McCAULEY,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals lacked jurisdiction by virtue of 28 U.S.C. §1447(d) to hear the appeal of the Respondents, either by direct appeal or by writ of mandamus, when the district court's order of remand was based on lack of subject matter jurisdiction pursuant to 28 U.S.C. §1447(c).

II. Whether the split in circuits on the issue of whether a plaintiff, having successfully moved to remand a case to state court, is required to show the removal was done "improvidently or in bad faith" to recover attorney's fees pursuant to 28 U.S.C. §1447(c), should be resolved in favor of the opinions of the courts of appeals in Mints, Morris, Moore, Morgan & Mirante.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED
[SUPREME COURT RULE 14(b)]

John Michael Borneman
District Court Docket No. 7:98-Cv-97-F (1)
Court of Appeals Record Nos. 99-1173, 99-1479 and 99-1982

United States of America
District Court Docket No. 7:98-Cv-97-F (1)
Court of Appeals Record No. 99-1173, 99-1479 and 99-1982

Richard McCauley
District Court Docket No. 7:98-Cv-97-F (1)
Court of Appeals Record No. 99-1982

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John Michael Borneman petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Borneman v. United States of America and In re: United States of America and Richard McCauley is reported at 213 F. 3d 819 (4th Cir. 2000). A copy of the opinion appears in the appendix to this petition at App.1-17. The written orders of the United States District Court for the Eastern District of North Carolina (1) remanding the case to the state court, (2) denying the motion of the United States of America for reconsideration of the order of remand and (3) denying the petitioner's motion for attorney's fees are not reported in any reporter. They appear in the appendix to this petition at App. 18-25, App. 26-31, and App. 32-33, respectively.

JURISDICTION

The judgment of United States Court of Appeals for the Fourth Circuit was entered in this case on May 30, 2000. Jurisdiction to review this petition is conferred on this court by 28 U.S.C. §1254. The petition is being filed within ninety (90) days of the date of decision of the case on appeal by the United States Court of Appeals for the Fourth Circuit.

STATUTORY PROVISIONS INVOLVED

The appendix to this petition contains the following statutory provisions: Title 28 of the United States Code, §§1447 (App.34) and Title 28 of the United States Code §2679 (App.35-37).

STATEMENT OF THE CASE

I. Factual Background

John Michael Borneman, the Petitioner, was employed by the United States Postal Service as a rural route mail carrier in Wilmington, North Carolina (App. 3). In his complaint Borneman, who also served as a union shop steward, alleged that on May 9, 1997, he and Richard McCauley engaged in a heated discussion over Borneman's request for auxiliary help in his duties so he could attend a meeting to discuss a grievance filed on behalf of a fellow union member (App. 3). Borneman felt McCauley had specifically failed to procure the necessary help and informed McCauley that he intended to file a grievance against him (App. 3). Borneman alleged that he then left McCauley's office in preparation for leaving the building at the end of the workday but McCauley then became angry and followed Borneman out of McCauley's office (App. 3). When Borneman was walking away, McCauley allegedly kicked Borneman's feet and pushed him from behind causing Borneman to fall to the tile floor causing Borneman injury to his right knee by way of a fracture to the right ossicle as well as a lateral meniscal tear which required surgery (App. 4).

II. Proceedings Below

Borneman filed his complaint based on assault and battery in the superior court of New Hanover County, North Carolina. The United States, as McCauley's employer, undertook to represent McCauley and filed (1) a notice of removal to federal court pursuant to 28 U.S.C. §§ 1441, 1442 and 2679; (2) a certification by an Assistant United States Attorney for the Eastern District of North Carolina stating at the time of the alleged assault McCauley "was acting within the scope of employment as an employee of the United

States"; (3) a notice of substitution of the United States as a party defendant in lieu of McCauley; and (4) a motion to dismiss Borneman's complaint under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure asserting sovereign immunity because the United States was not subject to suit under the Federal Tort Claims Act for the torts of assault and battery and that Borneman had also failed to exhaust administrative remedies (App. 4). Borneman moved to remand the suit to the state court arguing that McCauley had acted outside the scope of employment and there was no federal jurisdiction (App.4). The government responded with an affidavit of McCauley in which he stated he did not physically touch Borneman and that Borneman's injury was suffered while Borneman was "walking backwards some distance from me" and "making obscene gestures" (App. 4). McCauley further stated that he "presumed he tripped while walking backwards" (App. 4). Borneman's responded with his own affidavit alleging additional facts supporting his claim of assault and also attached to his affidavit a letter from his physician stating that in his opinion, "the greatest likelihood of mechanism of the injury to Borneman's knee based on his pathology would be a forward fall" which tended to support Borneman's version of the facts (App. 3-5).

Based upon the record the district court ruled that under North Carolina law, McCauley's actions did not fall within the scope of his employment and concluded the scope of employment certification was erroneous, the substitution of the United States was erroneous and the removal action by the United States to federal court was "improper". (App. 5; 18-25). The district court determined it lacked subject matter jurisdiction and remanded the case to state court, specifically citing 28 U.S.C. §1447(c) as a basis for its remand (App. 4-5; 18-25).

The United States filed a motion for reconsideration but that motion was denied by the district court on the

ground that 28 U.S.C. §1447(d) barred the district court from reconsidering its earlier order. (App. 5; 26-31)

Borneman then filed a motion for attorney's fees but the motion was denied, the district court concluding that the United States "did not act improvidently or in bad faith" in removing the suit (App. 5; 32).

The United States filed appeal to the United States Court of Appeals for the Fourth Circuit, challenging the district court's ruling the United States' certification and substitution actions were erroneous and also filed a petition for writ of mandamus seeking the review of the district court's order remanding the case to state court (App. 6). Borneman filed a cross-appeal from the district court's decision not to award attorney's fees (App. 6).

On May 30, 2000 the court of appeals issued its opinion and judgment holding that (1) 28 U.S.C. §1447(d) did not bar its review of the district court's ruling that Attorney General's scope of employment certification was erroneous or review of the order of remand to the state court; (2) it had authority to review such rulings either direct appeal or petition for writ of mandamus; (3) that because it concluded that material factual issues existed with respect to the existence of the alleged assault and its nature the district court's decision to reject the United States scope of employment certification was premature; and (4) that therefore the case would be remanded to the district court (App. 10-11). The court of appeals also affirmed the district court's denial of Borneman's motion for attorney fees (App. 17).

III. How the Federal Question Was Presented

The jurisdiction of the district court was invoked by the United States pursuant to 28 U.S.C. §§1441, 1442 and

2679. Petitioner Borneman contended that jurisdiction did not exist in the district court and successfully obtained remand of the case to the state court pursuant to 28 U.S.C. §1447(c). Borneman further contested the jurisdiction of the court of appeals to review the order of remand by virtue of the provisions of 28 U.S.C. §1447(d).

REASONS FOR GRANTING THE PETITION

The decision of the district court remanding the case to the state court was based upon its view that it lacked subject matter jurisdiction and the case was then remanded pursuant to 28 U.S.C. §1447(c). That being the case, 28 U.S.C. §1447(d) prohibits review of the district court's decision by the court of appeals by writ of mandamus pursuant to this Court's decision in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976) because, unlike the case in Thermtron, the remand order here was based on a §1447(c) ground. §1447 (d) also bars direct appeal as this Court's decision in Waco v. United States Fidelity and Guar. Co., 293 U.S. 140, 79 L. Ed. 244, 55 S. Ct. 6, (1934) does not provide authority for the court of appeals view that because it could review the scope of employment and substitution issues, that it could also review the order of remand. Furthermore, the decision of this Court in Thermtron was erroneous and should be overruled for the reasons as set forth in the dissent in Thermtron by then Justice and now Chief Justice Rehnquist.

The district court's decision denying Borneman attorney's fees was erroneous in that it required him to show that the remand was done "improvidently or in bad faith" when neither is required by §1447(c). The decision of the court of appeals affirming the district court's decision thus created a disagreement among the circuit courts of appeals on this issue.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE A QUESTION OF FIRST IMPRESSION, AN ANSWER TO WHICH WILL PROFOUNDLY AFFECT JURISDICTION IN THE FEDERAL COURTS AND THE RELATIONSHIP BETWEEN THE STATE AND FEDERAL COURTS: WHETHER 28 U.S.C. §1447(d) PROHIBITS FEDERAL APPELLATE COURTS FROM REVIEWING, BY APPEAL OR MANDAMUS, AN ORDER OF THE DISTRICT COURT REMANDING A REMOVED CASE TO THE STATE COURT WHEN THE ORDER OF REMAND IS SPECIFICALLY BASED ON THE DISTRICT COURT'S VIEW THAT IT LACKS SUBJECT MATTER JURISDICTION, A GROUND SPECIFIED IN 28 U.S.C. §1447(c).

A. The decision of the court of appeals directly conflicts with a decision of this Court as this Court did not create an exception to the bar of review of 28 U.S.C. §1447(d) in its decision in Thermtron Products, Inc. v. Hermansdorfer to allow appellate review of an order of remand when that order is based on the district court's view that it lacked subject mater jurisdiction to hear the removed case.

The district court's order specifically remanded the case for lack of subject matter jurisdiction, a ground recognized by 28 U.S.C. §1447(c). (App 25)

28 U.S.C. §1447(d) provides in precise and clear language that:

> An order remanding a case to a state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to §1443 of this title shall be reviewable by appeal or otherwise. [1]

This provision makes crystal clear the intent of Congress. The district court recognized that intent in its order denying the motion of The United States for reconsideration on January 6, 1999 (App. 26-31). However, in its opinion the court of appeals has carved out a judicially created exception to §1447(d), one which was not intended by Congress and conflicts with the decision of the Supreme Court in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976). The court of appeals found that:

> Thus, 28 U.S.C. §2679(d)(2), which gives the Attorney General the exclusive authority to determine removal jurisdiction under the Westfall Act, comes into tension with 28 U.S.C. §1447(d), which reserves to a district court the exclusive authority to determine on a remand motion whether the jurisdictional statute justifying removal is

[1] 28 U.S.C. §1443 applies to civil rights actions and thus is not applicable to this case.

> satisfied. This tension can best be resolved by giving effect to the intent of each statute and preserving to the district court its exclusive authority under §1447(d) over remand orders based on §1447(c) *except* when Congress directs otherwise in a more specific situation, such as where Congress gives the Attorney General the exclusive power to decide whether to have a Westfall Act case tried in federal court....

Borneman v. U.S., 213 F3d 819, 826 (4th Cir. 2000) (App. 8). The court of appeals then went on to note that:

> Accordingly, as *Thermtron* instructs, §1447(d) prohibits review of district courts' determinations of whether jurisdictional statutes have been satisfied, not review of determinations where district courts exceed their jurisdictional authority. Because §2679(d)(2) "conclusively" vests federal jurisdiction over a suit against a federal employee who the Attorney General has certified "was acting within the scope of his office or employment, "a district court has no authority to remand a case removed pursuant to that section, and the bar of §1447(d) does not preclude us from reviewing a remand order when the district court exceeds its authority.

Id. Thus, the Court of Appeals viewed this Court's decision in Thermtron as having recognized an "exception" to §1447(d)'s bar. Id. In the context of this case the "exception", according to the court of appeals, is when a case is removed pursuant to §2679 which, according to the court of appeals, "conclusively" vests federal jurisdiction

and removes any authority from the district court to remand the case. However in the same lengthy reasoning the court of appeals recognized, referring to this Court's decision in Thermtron, that:

> ... The Court thus left §1447(d) typically applicable to bar review of "any order remanding a case on *grounds permitted by the statute." Id.* at 352 (emphasis added)...

Id. The "statute" is 28 U.S.C. §1447(c) which provides that:

> The motion to remand the case on the basis of any defect other than subject matter jurisdiction must be made within thirty (30) days after filing of the notice of removal under §1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded....

Thus, a case may be remanded on the basis of any "defect" and is required to be remanded upon the appearance of lack of "subject matter jurisdiction".

The long and short of the matter is that the court of appeals simply disagreed with, or at least thought "premature", the decision of the district court finding that McCauley was not acting within the scope of his employment when he allegedly assaulted Borneman and that the district court thus lacked subject matter jurisdiction and was required to remand the case to the state court by virtue of the language in §1447(c). The court of appeals thus carved out its own "exception".

However, contrary to the opinion of the court of appeals, this Court in Thermtron did not create an

"exception" to §1447(d) allowing appellate review of the district court's order remanding the case when the remand order was based in the district court's view that it lacked subject matter jurisdiction. The court of appeals erroneously equated jurisdiction for the purpose of removal with the authority of the appellate courts to review the district court's decision on removal "by appeal or otherwise" by essentially holding that the district court had "no authority" to hold it lacked jurisdiction when it rejected the scope of employment certification which was the basis for removal, and thus mandamus was available to review the order of remand. However, one does not equate to the other and it takes a quantum leap to make the jump made here. In essence, the court of appeals rewrote §1447(d) to the effect that if an appellate court disagrees with the district court on a jurisdictional issue in a removal situation, at least in the circumstances here, and perhaps in others, then the court of appeals believes that it has the authority to review the district court's decision, even one predicated on a jurisdictional issue, a ground set out in §1447(c) requiring remand. Neither the statute nor Thermtron allows this.

In Thermtron clearly diversity of citizenship existed between the parties and the case was removed pursuant to 28 U.S.C. §1441. However, despite jurisdiction being questioned by no one, the district judge found that "...the court had reviewed its entire civil docket and found that there is not available time in which to try the above styled action in the foreseeable future" and that an adjudication of the merits of the case would be expedited in the state court..." 423 U.S. at 339. The court then ordered the defendants to show cause why the case should not be remanded and when he believed they had shown no prejudice they would incur by remand, proceeded to do just that. In other words, the district court simply refused to hear the case in the face of unquestioned diversity of jurisdiction and remanded the case because there was no available time

to try the case in his court in the foreseeable future. Thus the remand order was based on a reason totally unrelated to anything in the removal statute.

This Court noted that:

> It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to §1447(c) *whether erroneous or not and whether review is sought by appeal or by extraordinary writ* (emphasis added). This has been the established rule under §1447(d) and its predecessors stretching back to 1887. Sec, e.g., In re Pennsylvania Co. 137 U.S. 451, 34 L. Ed. 738, 11 S Ct. 141 (1890); Ex parte Matthew Addy S.S. Co. 256 U.S. 417, 65 L. Ed. 1027, 41 S Ct 508 (1921); Employers Reinsurance Corp. v Bryant, 299 U.S. 374, 81 L Ed 289, 57 S Ct 273 (1937); United States v Rice, 327 US 742, 90 L Ed 982, 66 S Ct 835 (1946). If a trial judge purports to remand a case on the ground that it was removed "improvidently and without jurisdiction," his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise.
>
> The issue before us now is whether §1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by §1447(c). Here respondent did not purport to proceed on the basis that his case had been removed "improvidently and without jurisdiction." Neither the propriety of the removal nor the jurisdiction of the court was questioned by

> respondent in the slightest. Section 1447(c) was not even mentioned.

423 U.S. at 343. Thus, the issue in Thermtron was whether the appellate courts had the authority to review the remand order if the order is not based on the grounds as set out in §1447(c). This Court went on to hold, over a vigorous dissent by then Justice and now Chief Justice Rehnquist, that a writ of mandamus was available to review the order of remand when the remand was not based on grounds allowed by §1447(c). 423 U. S. at 352.

The court of appeals in the present case misconstrued Thermtron and authorized a review of a remand order extending far beyond this Court's holding. The decision of the court of appeals now places litigants in a position where even a remand order based on a ground specifically permitted by the statute, i.e., lack of subject matter jurisdiction, is reviewable by writ of mandamus. This is contrary to this Court's holding in Thermtron where this Court expressly left §1447(d)'s bar to review of "any order remanding a case on grounds *permitted by the statute*" 423 U.S. at 352 (emphasis added). The lack of subject matter jurisdiction is unquestionably a ground *permitted by the statute* (emphasis added) regardless of whether the district court's decision is right or wrong. This Court has since emphasized that §1447(c) provides for remanding a removed case when the district court determines that there is no jurisdiction and that such an order of remand is not reviewable on appeal or otherwise and Thermtron is not to the contrary. Gravitt v. Southwestern Bell Telephone Co., 431 U.S. 723, 52 L Ed 2d 1, 97 S Ct 1439 (1977). This Court has also emphasized that review is barred when a case is remanded because of a time defect, another ground under §1447(c). Things Remembered, Inc. v. Petrarca 516, U.S. 124, 133 L. Ed. 2d 461, 116 S. Ct. 494 (1995). Furthermore, Section 1447(d) applies "not only to orders of remand in

suits removed under [the general removal statute] *but to orders of remand made in cases removed under any other statutes as well"* (emphasis added). United States v. Rice, 327 U.S. 742, 752, 90 L. Ed. 982, 66 S. Ct. 835 (1946).

The court of appeals' quarrel is with the district court's decision that McCauley was not acting within the scope of his employment and thus there was no jurisdiction in the federal courts. However, §1447(d)'s bar to review by "appeal or otherwise" is effective whether the district court decides rightly or wrongly the jurisdictional issue leading to an order of remand. Review of a remand order is unavailable when the order is based on one of the grounds enumerated in §1447(c) no matter how plain the legal error in ordering the remand. Briscoe v. Bell, 432 U.S. 404, 53 L Ed 2d 439, 97 S Ct 2428 (1977).

The petitioner thus requests that this Court grant certiorari to correct an erroneous interpretation by the court of appeals of the statute and Thermtron which interpretation expanded the reviewability of remand orders far beyond anything allowed.

B. The decision of the court of appeals conflicts with the decision of this Court in Waco v. United States Fidelity and Guar. Co. in that Waco does not allow review by direct appeal of an order of remand because an "antecedent" order, in this case, the order of the district court holding that the scope of employment certification was erroneous, was reviewable by appeal.

As the basis for its order of remand, the court of appeals recognized that the district court stated that it was

remanding the case for lack of jurisdiction, citing §1447(c), 232 F. 3d 825. The court of appeals then noted that "... if it were to accept this conclusion §1447(d) would, appear to bar it from reviewing the district court's order". 213 F. 3d at 825. However, the court of appeals then went on to state that since the remand order was based on two "antecedent decisions", i.e. that the scope of employment certification and the substitution of the United States as a defendant were erroneous. Id. The court of appeals then, citing its own decision in Mangold v. Analytical Servs., Inc., 77 F 3d 1442 (4th Cir. 1996) stated that "if these antecedent components of the district court's remand order are reviewable, it follows that the remand order itself should become reviewable because its propriety depends on premises that are not statutorily barred from review, or rather than on whether federal jurisdictional requirements referenced in §1447(c) are satisfied". Id. Thus, in rather cavalier fashion, the court of appeal's completely abrogated §1447(d) holding that if any "antecedent component" of the district court decision was reviewable, as was the "scope" certification pursuant to Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 132 L. Ed. 2d 375, 115 S. Ct. 2227 (1995), then §1447(d) does not apply to remand orders even though based on lack of jurisdiction. Thus under this analysis *all* remand orders are reviewable by direct appeal since rarely if ever, will they not result from some "antecedent" decision, contrary to the statute and contrary to this Court's decision in Thermtron and other cases cited above.

Waco v. United States Fidelity and Guar. Co., 293 U.S. 140, 79 L. Ed. 244, 55 S. Ct. 6 (1934) was cited by the court of appeals as authority it for its position. However, Waco stands for a position quite the contrary and is not authority for position of the court of appeals.

For the purpose of this petition, Waco deserves an analysis of what it says and does not say because petitioner believes it has also been misconstrued on other cases.

In Waco the plaintiff sued Combs and Glade, contractors, and the City of Waco for damages suffered by a collision with a street obstruction. All were Texas citizens. Waco then filed a crossclaim against United States Fidelity and Guaranty Company, a Maryland corporation and the bonding company for the contractors, alleging that Fidelity was liable on its bond to pay whatever amount might be adjudged due by Waco by reason of the fault of the contractors. Fidelity removed the case to federal court on the ground that as to it a "separable controversy" existed. On the plaintiff's motions, the district court entered three orders: (1) it overruled the plaintiff's motion to remand holding that the record did indeed present a "separable controversy" between Waco and Fidelity; (2) it allowed the plaintiff's motion to dismiss the crossclaim as it found that as to the plaintiff's cause of action Fidelity was an unnecessary and improper party under state law; and (3) upon that dismissal, since there was no diversity among the remaining parties, the entire case was remanded to the state court. The unintended consequence was that in the state court the district court's finding that Fidelity was an unnecessary and improper party would be binding upon Waco's right to maintain its crossclaim. 293 U.S. at 143. Waco appealed, *not from the order of remand* (emphasis added) but from the dismissal of its action against Fidelity. The court of appeals then dismissed the appeal holding that no appeal lay from an order of remand, the cause was irrevocably out of the district court, the action of the district court in dismissing the city's cross-action was moot and its propriety could not be reviewed. Id.

This Court thus noted that:

> "... True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the district court while it had control of the cause indisputably of this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner".

Id.

The Court then held that Waco was entitled to have the court of appeals determine whether dismissal of its case against Fidelity was proper. Id. However, this Court then went on to distinctly point out:

> *A reversal cannot affect the order of remand* (emphasis added) but it will at least, if the dismissal of the petitioner's complaint was erroneous, remit the entire controversy with the Fidelity Company still a party, to the state court for such further proceedings as may be in accordance with law.

293 U.S. at 143-144. Therefore, this Court, contrary to the opinion of the court of appeals, did not hold that an order of remand could be reviewed in spite of the bar of §1447(d), but only that the prior dismissal order could be reviewed under the very unique circumstances of this case. Thus the bar of §1447 stands as to any review of any order of remand, unless, as in Thermtron, the remand is for a reason as set forth in §1447(c).

The court of appeals thus misinterpreted Waco, again crafting a judicially created exception to the bar of review of a remand order by §1447(d) contrary to the intent of Congress and to the decisions of this Court.

C. The decision of the Supreme Court in Thermtron erroneously interpreted 28 U.S.C §1447(d)'s bar to review of an order of remand and should be overruled.

As noted above, Thermtron held that the provisions of 28 U.S.C. §1447(d) applied only to remand orders under §1447(c) and mandamus was an appropriate remedy when a remand order was not based on the grounds authorized by §1447(c). As noted by now Chief Justice Rehnquist in his dissent, in which he was joined by then Chief Justice Burger and Justice Stewart:

> The court begins its discussion in this case by asking the wrong questions, and compounds its error by arriving at the wrong answer to at least one of the questions thus posed. The principal, and in my view only, issue presented for review is whether the Court of Appeals was correct in concluding that it is without jurisdiction to review the order of remand entered by the District Court for the Eastern District of Kentucky. Even though jurisdiction existed, it of course follows that there was no power in the Court of Appeals to examine the merits of petitioner's contentions that the order of remand exceeded respondent's authority, and that its order denying relief must be affirmed. Mansfield, C & L M R Co. v. Swan, 111 U.S. 379, 28 L. Ed. 462, 4th S. Ct. 510 (1884). As I think it plain that Congress which has unquestioned authority to do so, Sheldon v. Sill, 8 How. 441, 12 L. Ed. 1147 (1850), has expressly prohibited the review sought by petitioners, I dissent.

423 U.S. at 353-54. §1447(d) is plain on its face; indeed it is hard to imagine the language "by appeal or otherwise" could be more expansive in extending the bar to review to all orders of remand, however denominated.

The majority in Thermtron correctly, as set out above, recognized that the general rule prohibiting review of remand orders has been a part of American jurisprudence for at least a century. 423 U. S. 343.

The non-reviewability rule rests on a "policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed". United States v. Rice, 327 U.S. at 751. Also, as eloquently noted by Chief Justice Rehnquist in his dissent in Thermtron:

> Congress' purpose in barring review of all remand orders has always been very clear – to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may

become a device affording litigants a means of substantially delaying justice.

It is clear that the ability to invoke appellate review, even if ultimately unavailing on the merits, provides a significant opportunity for additional delay. Congress decided that this possibility was an unacceptable source of additional delay and therefore made the district courts the *final* arbiters of whether Congress intended that specific actions were to be tried at a federal court.

I do not doubt that the district courts may occasionally err in making these decisions, and certainly Congress was not unaware of these probabilities. All decision makers err from time to time, and judicial systems frequently provide some review to remedy some of the errors. Such review is certainly not compelled. Congress balanced the continued disruption and delay caused by further review against the minimal possible harm to the party attempting removal - who will still receive a trial on the merits before a state court which cannot be presumed to be unwilling or unable to afford substantial justice - and concluded that no review should be permitted in these cases. Congress has explicitly indicated its intent to achieve this result; indeed "it is difficult to see what more could be done to make the action of [remand] final, for all the purposes of the removal, and not the subject of review..." Morey v. Lockhart, 123 U.S. 56, 57, 31 L. Ed. 68, 8 S.

> Ct. 65 (1887). Yet the court today holds that Congress did not mean what it so plainly said.

423 U.S. at 354-55. The predicate through which remand was ordered in the present case was a §1447(c) reason, and whether the district court's decision was erroneous or not on the jurisdictional issue, this Court's opinion in Briscoe v. Bell, cited above, makes clear that review is precluded no matter how plain the legal error in ordering the remand.

In Thermtron, Chief Justice Rehnquist then went on to warn of the consequences of this Court's holding:

> Nor is it any more than a naive hope to suppose, as the Court apparently does, that the effect of today's decision will be limited to the unique circumstances of this case...
>
> The Court seems to believe the instant case different because it has determined to its satisfaction that respondents order was not merely an erroneous application of §1447(c), but was based upon a consideration district court's are not empowered to evaluate. I think the court's purported distinction both unworkable and portentous of the significant impairment of Congress's carefully worked out scheme. The Court relies upon its belief that respondent's order made clear that he was not acting in accordance with §1447(c). But there was no requirement that respondent issue any explanation of the grounds for his remand order, and there is no reason to expect that district courts will always afford such explanations. If they do not, is there now jurisdiction in the courts of appeals to compel an explanation so as to evaluate potential

> claims that the lower court was not acting pursuant to subsection (c)? And what if the district court does state that it finds no jurisdiction, using the rubric of §1447(c), but the papers plainly demonstrate such a conclusion to be absurd? Are potential challengers to such an order entitled to seek the aid of the court of appeals, first to demonstrate that the order entered by the lower court was a sham and second to block that order pursuant to today's decision? If the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open to potential opponents of orders of remand. Yet it is equally clear that such devices would soon render meaningless Congress' express, and heretofore fully effective, directive prohibiting such tactics because of their potential for abuse by those seeking only to delay.

423 U.S. 356-357.

Alas, the portents warned of by Chief Justice Rehnquist have occurred. The court of appeals has now crafted an "exception" to §1447(d)'s bar to review even in a circumstance in which the district court's remand order specifically stated that the remand was for lack of jurisdiction, a recognized ground under §1447(c). The "exception" created by the court of appeals, and not by this Court, is where removal is pursuant to a specific statute, i.e., 28 U.S.C. §2679.

The court of appeals has thus erroneously elevated a disagreement over the correctness of the district court's

decision on the jurisdiction issue to a decision meaning §1447(d) has been abrogated when a federal employee is sued and a scope of employment certification issues. Thus, the court of appeals has removed the district court as *final arbiter* of the jurisdictional issue and has substituted in lieu thereof the Attorney General, or in this case, his designee, an Assistant United States Attorney for the Eastern District of North Carolina, hardly a *disinterested arbiter*.

The present case is a creation of state law. The complaint is based upon an assault and battery allegedly perpetrated by one resident of New Hanover County, North Carolina, against another. As recognized by the court of appeals, state law will be applied to the case if tried regardless of where the trial occurs. 213 F. 3d at 829 (App. 16). It seems only logical that the courts of North Carolina would be more familiar with their own tort law with which they deal everyday, than the federal forum. Conversely, why should the federal courts be cluttered with what is in reality a creature of state law? If the outcome at the trial level in state court is unsatisfactory to either party, then the appellate courts of North Carolina would be asked to pass review on law which they apply everyday, and even sometimes change. An appeal after the trial on merits in federal court would place the court of appeals in the role of attempting to predict what the state appellate courts would do under similar circumstances, perhaps even leading to a different conclusion on appeal then one which would have been reached by the state courts.

Both Borneman and McCauley are residents of New Hanover County from which a jury pool of their peers would be drawn. If the case is remanded to state court, McCauley "... will still receive a trial on the merits before a state court which cannot be presumed to be unwilling or unable to afford substantial justice". See, Thermtron, 423 U.S. at 355. As warned by Chief Justice Rehnquist, Borneman has now

been required to undergo a lengthy delay in reaching trial on the merits of his case. His original complaint was filed in the Superior Court of New Hanover County in May, 1998. We now find ourselves almost two years and four months later involved in protracted litigation over a jurisdictional issue which has not advanced this case one iota towards resolution on the merits to which Borneman is entitled before his case grows stale with age. Furthermore, as obvious from the record in this case, the litigation has been between parties of unequal financial circumstances leaving Borneman with the burden of substantial legal costs, while at the same time his opponent, McCauley, is represented at public expense.

Could all this have been avoided? The obvious answer must only be in the affirmative. Thermtron, as warned by Chief Justice Rehnquist, in so far as it allowed appellate review of an order of remand for a reason not set out in §1447(c), and as erroneously extended by the Fourth Circuit in this case, has led us down a slippery slope. As has often been said, "bad facts make bad law". With all due respect to the majority in Thermtron, that case was erroneously decided. This Court should grant certiorari because now is the opportunity to overrule Thermtron and correct that error, make clear that §1447(d) means what it says and foreclose the opportunity for the types of results reached by the court of appeals here.

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE A DISAGREEMENT AMONG THE CIRCUITS WITH REGARD TO THE ISSUE OF WHETHER A PLIANTIFF, HAVING SUCCESSFULLY MOVED TO REMAND A CASE TO STATE COURT, IS REQUIRED TO SHOW THAT THE REMOVING PARTY ACTED INPROVIDENTLY OR IN BAD FAITH IN

REMOVING THE ACTION IN ORDER TO RECOVER ATTORNEY'S FEES AND COSTS PURSUANT TO 28 U.S.C. §1447(c).

This issue prevents a question of first impression before the Supreme Court and one on which, as a result of the decision of the court of appeals in this case, there is now a disagreement among the circuit courts of appeals.

In its order denying Borneman's motion for attorney's fees pursuant to 28 U.S.C. §1447(c), the district court found that the United States did not act "improvidently or in bad faith in removing the case". (App. 5). Although only obliquely addressing the issue in light of its holding that the district judge erred in remanding the case, the court of appeals affirmed the district court's denial of attorney's fees thereby also affirming the district court's reasoning. 213 F. 3d at 829. (App. 32-33).

28 U.S.C. §1447 (c) provides in pertinent part that:

> "...An order remanding the case may require payment of just costs and the actual expenses, including reasonable attorney's fees, incurred as a result of the removal..."

Though not previously addressed by this Court this issue has been addressed by a number of the courts of appeals which have until now, held that a showing of "bad faith" is not required in order to award attorney's fee under the statute. See, Mints v. Educational Testing Service, 99 F.3d 1253 (3rd Cir. 1996); Morris v. Bridgestone-Firestone, Inc., 985 F.2d 238 (6th Cir. 1993); Moore v. Permanente 981 F.2d 443 (9th Cir. 1992), Morgan Guar. Trust Co. v. Republic of Palau, 971 F 2d 917 (2nd Cir. 1992) and A.S.

Miranti v. Lee 3 F.3d 925 (5th Cir. 1993). As noted by the Third Circuit in Mints:

> "...We agree with the other courts of appeals which have held that the District Court may require the payment of fees and costs by a party which removed the case which the court then remanded, even though the party removing the case did not act in bad faith. See, Morris v. Bridgestone-Firestone, Inc., 985 F.2d 238, 240 (6th Cir. 1993); Moore v. Permanente, 981 F.2d at 447; Morgan Guar. Trust Co. v. Republic of Palau, 971 F2d at 923-924..."

Therefore, the Second, Third, Fifth, Sixth and Ninth Circuits have held that a showing of bad faith is not required in order to recover attorney's fees under 28 U.S.C. §1447(c). Thus, the decision of the Fourth Circuit in this case affirming the district court's denial of attorney's fees because the case was not removed "improvidently" or in "bad faith" has created a split of authority among the circuits.

Essentially, the United States in the district court did not take the position that Borneman had to show "bad faith"; but appeared to take the position it should be absolved because of its "good faith". However, Congress imposed no "bad faith" requirement or "good faith" defense when it originally enacted 28 U.S.C. §1447(c) or when the statute was amended into its present form in 1988. The cases which are cited above completely reject the "good faith" or "bad faith" approach. The district court, in its order, cited the Fourth Circuit's decision in ITT Indus. Credit Co. v. Durango Crushers, Inc., 832 F.2d 307 (4th Cir. 1987) as authority for its decision. That case was decided when 28 U.S.C. §1447(c), as it existed prior to the 1988 amendment, allowed the award of "just costs" if the lawsuit was

"removed improvidently and without jurisdiction" and made no provision to award attorney's fees. However the Fourth Circuit upheld an award of attorney's fees finding that the defendant's removal petition was so patently without merit that it was filed in "bad faith". However, the decision was based on the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975) which "...pointed out that courts do have an inherent power to award attorney's fees against a party who has acted in bad faith. 420 U.S. at 258-59, 95 S.Ct. 1622." ITT Indus. Credit Co. 832 F.2d at 308. Thus, ITT Indus. Credit Co. was not decided under §1447(c) which then only provided for an award of "costs" and then only when the case was removed "improvidently and without jurisdiction" but under the inherent power of the court in "bad faith" cases.

§1447(c) was then amended in 1988 to allow an award of attorney's fees as well as costs, and deleting the requirement that they be awarded only where the case was removed "improvidently and without jurisdiction". The statute as enacted allowed the recovery of "...attorney's fees, *incurred* (emphasis added) as a result of removal..." Nothing was mentioned of any other requirement and the intent of Congress should have been clear that attorney's fees are to be awarded when "incurred as a result of removal".

Congress by removing from the statute that costs are to be awarded only if the lawsuit was removed "improvidently and without jurisdiction" quite clearly indicated that there was also no requirement the case be "improvidently" removed to award "costs" which now also include "attorney's fees". The 1988 amendment to 28 U.S.C. §1446 also deleted subdivision (d) of that statute requiring that a bond accompany the removal. The intent is contained in the commentary to §1446:

> "...Congress points to the 1988 enactment of subdivision (c) of §1447 permitting a remand order in an improperly removed case may award not merely costs now, but "actual expenses, including attorney's fee" as offering an adequate costs threat and notes that Rule 11 of the Federal Rules of Civil Procedure can be turned to for "a more severe sanction" if it proves warranted. (See House Report 100-889, August 26, 1988, page 72)..."

In Morgan, cited above, the Second Circuit reviewed the legislative intent:

> Whatever argument might have been made to a bad faith removal requirement under the old statute is mooted, in our view, by the amended version of Section 1447(c) applicable to costs and attorney's fees. The amendment did not add the phrase "bad faith" to the statute, but rather deleted the argument that the case have been "removed improvidently". Indeed the statute, as amended makes no reference at all to the state of mind or content of the party removing the action, instead focusing strictly on the absence of subject matter jurisdiction. The amendment also added to the statute an explicit reference to attorney's fees as part of the costs that may be awarded. We must, at least in the absence of strong and convincing evidence to the contrary, consider such sharply different wording to have been a definite choice of Congress.

981 F. 2d at 446.

The authority among the courts of appeal is therefore overwhelming in rejecting what the United States asserts to be a "good faith" defense. No such requirement was included in §1447 (c) when it was adopted by Congress. The only qualifier to the award of attorney's fees, in that section is that the court "may" award attorney's fees, thus vesting the decision in the sound discretion of the court. Another excellent analysis of Congress' intent is contained in the opinion of the district court in Shrader v. Legg Mason Wood Walker, Inc. 880 F. Supp. 366, 368 (E.D. Pa. 1995), as follows:

> "We discuss the statutory language in more detail below, but at the outset we note that §1447(c) provides district courts with the discretion to remedy abuses in the use of removal procedure. As Mary wisely concedes, §1447(c) does not require a finding of bad faith, see, A.S. Miranti vs. Lee, 3 F.3d 925, 929 (5th Cir. 1993); Moore vs. Permanete Medical Group, Inc., 981 F.2d 443, 445-447 (9th Cir. 1992); Morgan Guar. Trust Co. vs. Republic of Palu, 971 F.2d 917, 923-23 (2nd Cir. 1992), and we therefore conclude that Congress intended the statute to serve remedial not punitive purposes. See, e.g. Moore, 981 F.2d 447 (noting that §1447(c) awards are "simply reimbursement"); Morgan Guar. Trust Co. 971 F.2d 926 (Walker, J., dissenting) ("Section 1447 is principally designed to compensate..."). The legislative history of §1447(c) confirms this interpretation. See, H.R. Rep. No. 889. 100th Cong., 2d Sess. 72 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6033 (noting that Sec. 1447 (c) allows

> "payment of actual expenses incurred" and that "Civil Rule 11 can be used to impose a more severe sanction when appropriate")."

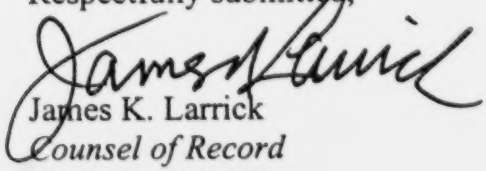
Thus, Congress' intention that this statute serve a "remedial" rather than a "punitive" purpose reveals clearly that Congress did not intend that a plaintiff be required to show "bad faith" or a lack of "good faith" to obtain the award of attorney's fees, nor that the case was removed "improvidently".

This Court should grant certiorari to resolve the disagreement among the circuits and to establish the rule that a party, having successfully moved to remand a case, is not required to show that the removal was done "improvidently or in bad faith" to recover attorney's fees.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,



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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Argued: February 28, 2000
Decided: May 30, 2000
Entered: May 30, 2000

JOHN MICHAEL BORNEMAN,
Plaintiff-Appellee,

v. No. 99-1173

UNITED STATES OF AMERICA,
Defendant-Appellant.

JOHN MICHAEL BORNEMAN,
Plaintiff-Appellant,

v. No. 99-1479

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
James C. Fox, District Judge.
(CA-98-97-7-F)

In Re: UNITED STATES OF AMERICA;
RICHARD MCCAULEY, No. 99-1982
Petitioners.

On Petition for Writ of Mandamus.
(CA-98-97-7-F)

Before NIEMEYER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Williams and Judge Motz joined.

COUNSEL

ARGUED: Neil Irving Fowler, Assistant United States Attorney, Raleigh, North Carolina, for Appellant. James Kenneth Larrick, Wilmington, North Carolina, for Appellee. **ON BRIEF:** Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellant.

OPINION

NIEMEYER, Circuit Judge:

In this appeal, we address whether John Borneman, a United States postal employee, may maintain a state common-law action against Richard McCauley, a fellow postal employee, for an assault and battery that allegedly occurred during work. Proceeding under the Westfall Act, the United States represented McCauley and removed this action to federal court, certifying that McCauley had acted within the scope of his employment and substituting the United States as the sole defendant. The United States then moved to dismiss the action because McCauley's conduct, as so imputed to the United States, was protected by sovereign immunity. Without resolving disputed facts, the district court concluded that the United States' certification and

substitution were erroneous. The district court found that the removal to federal court was therefore improper and entered an order remanding the case to state court.

After addressing the complex question of whether we have jurisdiction to review the district court's rulings and concluding that we do, we vacate the district court's remand order, as well as its rulings that the United States' certification and substitution were erroneous, and we remand this case to the district court to resolve the factual question of whether McCauley's actions fell within the scope of his employment. We affirm the district court's order denying Borneman his attorneys fees.

I

John Borneman, employed by the United States Postal Service as a rural route mail carrier, commenced this assault and battery action in state court in Wilmington, North Carolina, against a Postal Service manager, Richard McCauley, who, Borneman alleged, assaulted him during a dispute at work. In his complaint, Borneman, who also served as a union shop steward, alleged that on May 9, 1997, he and McCauley became engaged in a heated discussion about labor-management issues and Borneman's request for auxiliary help in his mail-sorting and delivery duties so that he could attend a meeting with a supervisor to discuss a grievance filed on behalf of fellow union members. Borneman felt that McCauley had wrongfully failed to procure the requested auxiliary help, and he informed McCauley that he wanted to file a grievance against McCauley related to this issue. Borneman alleged that McCauley then became angry and followed Borneman out of McCauley's office. Borneman further alleged that as he was walking away, McCauley "kicked[Borneman's] feet and pushed him from behind with his hand causing[Borneman] to fall forward onto the tile floor. [Borneman] fell on his right knee severely injuring it." Borneman asserted that he

suffered a "fracture of the right ossicle as well as a lateral meniscal tear," which required surgery.

The United States, as McCauley's employer, undertook to represent McCauley and filed (1) a notice of removal to federal court pursuant to 28 U.S.C. SS 1441, 1442, and 2679; (2) a certification made by the Attorney General through the Assistant United States Attorney for the Eastern District of North Carolina that, at the time of the alleged assault, McCauley "was acting within the scope of employment as an employee of the United States"; (3) a notice of the substitution of the United States as party defendant in lieu of McCauley; and (4) a motion to dismiss Borneman's complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting sovereign immunity because the United States is not subject to suit under the Federal Tort Claims Act for the torts alleged by Borneman and, in any event, Borneman failed to exhaust administrative procedures.

Borneman opposed removal and moved to remand his suit to state court, arguing that McCauley had acted outside the scope of his employment in assaulting Borneman and that federal jurisdiction was therefore lacking. The government responded with the affidavit of McCauley, in which he asserted that he did not physically touch Borneman and that he did not cause Borneman's injury. According to McCauley, Borneman left McCauley's office, "walking backwards some distance from me," making obscene gestures and "cursing." McCauley stated that he ordered Borneman "to leave the building, turned and was walking back to my office when I heard a noise. I looked back and [Borneman] was on the floor. I never touched [Borneman], did not push him, and presume he tripped while walking backwards." Borneman responded with his own affidavit, alleging additional facts supporting his claims of assault and battery and challenging McCauley's description of the events as "simply untrue." Borneman attached to his affidavit a letter from his physician stating that in his opinion, "the

greatest likelihood of mechanism of injury [to Borneman's knee] based on his pathology would be a forward fall," which tended to support Borneman's version of the facts.

Without a hearing and based on this record, the district court disposed of the United States' motion to dismiss the complaint and Borneman's motion to remand in an opinion and order dated October 15, 1998. The district court ruled that under the North Carolina law of respondeat superior, McCauley's actions, taken as alleged by Borneman in his complaint and affidavit, did not fall within the scope of McCauley's employment. The district court therefore concluded that the scope-of-employment certification by the Attorney General "was erroneous," that the substitution of the United States as the defendant "also was erroneous," and that removal of the action by the United States to federal court "was improper." The court determined accordingly that it lacked subject matter jurisdiction and remanded the case to state court, citing 28 U.S.C. § 1447(c) as the basis for its remand.

The United States filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), requesting an evidentiary hearing to resolve the factual dispute of whether "Manager Richard McCauley was acting within the scope of his employment when the alleged tortious action occurred." The United States maintained that the court should not have resolved the factual dispute in Borneman's favor without an evidentiary hearing. The district court denied the motion on the grounds that 28 U.S.C. § 1447(d) prevented the court from reconsidering its earlier order.

Thereafter, Borneman filed a motion for an award of attorneys fees and costs in the amount of $6,273 because the position of the United States in removing this case "was not substantially justified." The district court denied this motion, concluding that the United States "did not act improvidently or in bad faith" in removing the suit.

The United States filed this appeal, challenging the district court's ruling that the United States' certification and substitution actions were erroneous based on an application of North Carolina principles of respondeat superior. The United States also filed a petition for a writ of mandamus, seeking review of the district court's order remanding the case to the state court. Borneman filed a cross-appeal, challenging the district court's decision not to award him attorneys fees.

II

We first address Borneman's contention that we lack jurisdiction to consider the United States' appeal and petition for mandamus relief. Borneman argues that the district court's order remanding the case to state court deprives this court of jurisdiction because, under 28 U.S.C. § 1447(d), "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Borneman maintains that § 1447(d) prohibits us from reviewing both the district court's remand order and its antecedent rulings rejecting the United States' certification and its substitution as the defendant under §§ 5 and 6 of the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act"), 28 U.S.C. § 2679(b) & (d). As we have noted, the district court, relying on its conclusion that McCauley was not acting within the scope of his employment, ruled that the Attorney General's certification and the substitution of the United States as defendant was "erroneous," and that the removal to federal court was "improper." Concluding that it therefore lacked jurisdiction, the district court remanded the case to state court, citing 28 U.S.C. § 1447(c).

Section 1447(c) of Title 28 provides that a case removed to federal court must be remanded to state court if it appears that the federal court lacks subject matter jurisdiction:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

If a district court orders a remand based on § 1447(c), its order is not reviewable by a court of appeals by reason of 28 U.S.C. § 1447(d). Thus, while 28 U.S.C. §§ 1441, 1442, and 2679-- the sections relied upon by the United States in this case -- are among various statutes authorizing removal of state-filed cases to federal court, review by appeal, by mandamus, or otherwise is precluded under § 1447(d) if the remand is based on one of the "grounds specified in § 1447(c)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976). Whether a district court's remand order is reviewable under § 1447(d) is not determined by whether the order explicitly cites § 1447(c) or not. *See Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996). The bar of § 1447(d) applies to any order invoking substantively one of the grounds specified in § 1447(c). *See id.* at 1450-51.

In this case, the court did state that it was remanding the case for lack of jurisdiction, citing 28 U.S.C. § 1447(c). Therefore, if we are to accept this conclusion, § 1447(d) would, at first blush, appear to bar us from reviewing the district court's order. Unfortunately, in the circumstances presented, the task is not so straightforward. The district court's conclusion that it did not have subject matter jurisdiction was premised on two antecedent decisions that are both judicially reviewable and appealable: (1) that the United States' scope-of-employment certification was erroneous and (2) that the United States' substitution as

defendant was erroneous. 1[1] If these antecedent components of the district court's remand order are reviewable, it follows that the remand order itself should become reviewable because its propriety depends on premises that are not statutorily barred from review, rather than on whether the federal jurisdictional requirements referenced in § 1447(c) are satisfied. *See Mangold*, 77 F.3d at 1453. And an otherwise reviewable ruling is not shielded from review merely because it is a constituent aspect of a remand order that would itself appear to be insulated from review by § 1447(d). *See Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (treating separately components of district court's order dismissing a party and remanding action); *Mangold*, 77 F.3d at 1446 (treating separately components of district court's order denying immunity and remanding action to state court).

But even if a remand order does not in this oblique manner become subject to review when its underlying premises are appealed, § 1447(d)'s restriction on appellate review of remand orders cannot be read categorically when other statutes in tension with it are considered. Removal by the United States in this case rested not only on §§ 1441 and 1442 but also on § 2679(d)(2), which provides that upon a scope-of-employment certification by the Attorney General, the state-court action "shall be removed" to federal court. Moreover, the statute provides that *for purposes of removal*, the certification is "conclusive[ ]." 28 U.S.C. § 2679(d)(2).

In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), the Supreme Court held that the Attorney General's scope-of-employment certification made under § 2679(d)(2)

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[1]*See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (holding that certification for purposes of substitution is judicially reviewable); *Jamison v. Wiley*, 14 F.3d 222, 230 n.10, 233-34 (4th Cir. 1994) (holding that rejection of certification amounts to a denial of absolute immunity which is immediately appealable); *Aliota v. Graham*, 984 F.2d 1350, 1353-54 (3d Cir. 1993) (same); *Mitchell v. Carson*, 896 F.2d 128, 133 (5th Cir. 1990) (same).

serves two offices. It forms the basis for the United States to be substituted as defendant, a consequence that is subject to judicial review. *See* 515 U.S. at 434. It also conclusively establishes removal jurisdiction in the federal court, a consequence that is not judicially reviewable. *See id.* at 432 ("Congress made the Attorney General's certificate conclusive solely for purposes of removal, and notably not for purposes of substitution."); *see also Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir. 1993) ("Congress, by expressly stating that the Attorney General's certification is 'conclusive' as to jurisdiction, has prohibited a district court from using its disagreement with the Attorney General's scope of employment certification to deny jurisdiction and so send the case back to the state court where it originated"). Thus, in § 2679(d)(2), Congress withdrew from judicial determination any review of the Attorney General's decision to remove a case and have it determined in a federal forum. As the Third Circuit stated in *Aliota*, "Since subject matter jurisdiction has been conclusively established, there is no jurisdictional question to be resolved by the district court." 984 F.2d at 1357. And any district court that attempts to review the propriety of the Attorney General's removal made under § 2679(d)(2) exceeds its statutory authority.

Thus, 28 U.S.C. § 2679(d)(2), which gives the Attorney General the exclusive authority to determine removal jurisdiction under the Westfall Act, comes into tension with 28 U.S.C. § 1447(d), which reserves to a district court the exclusive authority to determine on a remand motion whether the jurisdictional statute justifying removal is satisfied. This tension can best be resolved by giving effect to the intent of each statute and preserving to the district court its exclusive authority under § 1447(d) over remand orders based on § 1447(c) except when Congress directs otherwise in a more specific situation, such as where Congress gives the Attorney General the exclusive power to decide whether to have a Westfall Act case tried in federal court. Stated otherwise, § 1447(d) typically precludes review

of remands based on whether the requirements of federal jurisdiction have been satisfied, such as whether there is complete diversity, *see Aliota*, 984 F.2d at 1357, but Congress never" intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute," *Thermtron*, 423 U.S. at 351. Indeed, in *Thermtron*, the Supreme Court appears to have recognized an exception to § 1447(d)'s bar as follows:

> Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).

423 U.S. at 351. The Court thus left § 1447(d) typically applicable to bar review of "any order remanding a case on grounds permitted by the statute." Id. at 352 (emphasis added); *see also Mangold*, 77 F.3d at 1453; *Aliota*, 984 F.2d at 1357.

Accordingly, as Thermtron instructs, § 1447(d) prohibits review of district courts' determinations of whether jurisdictional statutes have been satisfied, not review of determinations where district courts exceed their jurisdictional authority. Because § 2679(d)(2) "conclusively" vests federal jurisdiction over a suit against a federal employee who the Attorney General has certified" was acting within the scope of his office or employment," a district court has no authority to remand a case removed pursuant to that section, and the bar of § 1447(d) does not preclude us from reviewing a remand order when the district court exceeds its authority.

Therefore, we hold (1) that 28 U.S.C. § 1447(d) interposes no bar to either our review of the district court's

ruling that the Attorney General's scope-of-employment certification for the purpose of substitution under the Westfall Act was erroneous or our review of the consequent remand order entered in violation of 28 U.S.C. § 2679(d)(2) and (2) that we have authority to review such rulings either as appealable decisions under 28 U.S.C. § 1291 or on petition for a writ of mandamus. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996) (finding remand order appealable final order because "[w]hen a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket"); *Thermtron*, 423 U.S. at 351 (because the district court exceeded statutory authority, mandamus review was not barred by § 1447(d)); *Shives v. CSX Transp., Inc.*, 151 F.3d 164, 167-68 (4th Cir. 1998) (recognizing review of remand order either under final judgment principle or under petition for writ of mandamus); *cf. Mangold*, 77 F.3d at 1453 (treating appeal of a remand order as a petition for a writ of mandamus).

III

This brings us to the merits of the district court's rulings that the United States' scope-of-employment certification was erroneous and that, accordingly, the substitution of itself as party defendant was also erroneous. The district court reached these conclusions by applying the law of North Carolina, where the alleged assault and battery occurred, to the facts as asserted by Borneman in his complaint and affidavit and determining that "McCauley's tortious act was not committed in the scope of his employment." The United States' challenge to these rulings presents two questions: (1) whether the district court followed the proper procedure for reviewing a Westfall Act certification and (2) whether the district court properly applied the North Carolina law of respondeat superior -- questions that we now address.

A

In *Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997), we stated that the plaintiff has the burden of persuasion "to refute the certification of scope of employment issued by the Attorney General and to prove by a preponderance of the evidence that the defendants were not acting within the scope of their employment." *See also Gutierrez de Martinez v. Drug Enforcement Administration*, 111 F.3d 1148, 1153-55 (4th Cir. 1997). "If the plaintiff presents persuasive evidence refuting the certification," the burden shifts to the United States to "provide evidence and analysis to support its conclusion that the torts occurred within the scope of employment." *Maron*, 126 F.3d at 323; see also Gutierrez, 111 F.3d at 1155. To carry its burden, the plaintiff must submit "specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation." *Gutierrez*, 111 F.3d at 1155.

Recognizing the "desirability of quickly resolving the scope-of employment issue" because "immunity under the Westfall Act, like other forms of absolute and qualified immunity, 'is an immunity from suit rather than a mere defense to liability,'" *Gutierrez*, 111 F.3d at 1154 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)), we emphasized that "the district court should remain cognizant of the considerations weighing against protracted litigation under the Westfall Act," *id.* at 1155. Nevertheless, we recognized that this burden-shifting proof scheme would sometimes make it advisable for the trial court to permit limited discovery or conduct an evidentiary hearing to resolve competing factual claims concerning the scope-of-employment issue. At all stages of the process, it is for the district court to weigh the sufficiency of the evidence, to determine whether genuine issues of fact exist, and ultimately to resolve these factual issues.

Once any factual issues are resolved, the district court must then proceed to "weigh the evidence on each side to determine whether the certification should stand." *Gutierrez*, 111 F.3d at 1155. In making this ultimate determination, the district court must apply the law of the state in which the alleged tort occurred to ascertain whether the federal employee was acting within the scope of his employment. *See Maron*, 126 F.3d at 323-24; *Jamison v. Wiley* , 14 F.3d 222, 237 (4th Cir. 1994).

In this case, the district court properly recognized that Borneman presented evidence refuting the United States' certification. The court referred to Borneman's complaint and his affidavit, reciting Borneman's version of the facts. But then, without discussing the facts presented by the United States in McCauley's affidavit, the court simply concluded that "McCauley's tortious act was not committed in the scope of his employment." Because the court never acknowledged the competing factual position presented by the United States, it over-looked its obligation to resolve disputed factual contentions. Rather, it accepted Borneman's contested allegations as true, thus failing to hold him to his burden of proof.

While the accounts of Borneman and McCauley are consistent in some respects, they differ on the central issue of this case. Borneman contends that McCauley pushed and tripped him, causing him to fall. McCauley denies that any physical contact occurred and claims that he had turned around and was returning to his office at the time he heard Borneman fall. Clearly, if McCauley's account of the incident were believed, there would be no basis for asserting that he had committed an intentional tort and no basis for finding that he had acted outside the scope of his employment. This critical discrepancy is therefore material to the court's determination. Nonetheless, the district court apparently took Borneman's allegations as true, rather than requiring him to "present[ ] persuasive evidence," *Maron*, 126 F.3d at 323, in support of the allegations and allowing

McCauley and the government to present contrary evidence, which would then be weighed by the court.

B

Even if Borneman's version of events, as stated in his complaint and alleged in his affidavit, is found to be controlling, it is not clear that McCauley acted outside the scope of his employment under North Carolina law. While it is true, as the district court recognized, that under the North Carolina law of respondeat superior, an intentional tort is "rarely considered to be within the scope of an employee's employment," *Medlin v. Bass*, 398 S.E.2d 460, 464 (N.C. 1990) (quotation marks and citation omitted), "rarely" does not mean "never." And in North Carolina, the scope-of-employment question is ordinarily one for the jury. *See id.* at 463; *see also Robinson v. McAlhaney*, 198 S.E. 647, 650 (N.C. 1938); *Stanley v. Brooks*, 436 S.E.2d 272, 274 (N.C. Ct. App. 1993); *Edwards v. Akion* , 279 S.E.2d 894, 900 (N.C. Ct. App. 1981); *Evington v. Forbes*, 742 F.2d 834, 836-37 (4th Cir. 1984) (recognizing North Carolina rule that close or doubtful scope-of-employment cases are submitted to the jury).

North Carolina case law discloses numerous instances in which the issue of whether an intentional assault by an employee was within the scope of employment so as to impose vicarious liability on the employer was determined to be a jury question. *See, e.g., Clemmons v. Life Ins. Co. of Ga.*, 163 S.E.2d 761, 766 (N.C. 1968) (collection agent for insurance company threatened plaintiff with pistol when she was unable to pay premium); *Munick v. Durham*, 106 S.E. 665, 667 (N.C. 1921) (city employee assaulted plaintiff when he paid portion of his water bill in pennies); *Carawan v. Tate*, 280 S.E.2d 528, 531 (N.C. Ct. App. 1981), modified, 286 S.E.2d 99 (N.C. 1982) (parking lot attendant drew gun on plaintiff after plaintiff refused to pay parking fee); Edwards, 279 S.E.2d at 900 (sanitation worker grabbed and

hit plaintiff after dispute about the manner in which the worker collected plaintiff's refuse). The principle that should govern this factual inquiry has been formulated in various ways by the North Carolina courts: whether the employee was "about his master's business or whether he stepped aside from his employment to commit a wrong prompted by a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own," see *Medlin*, 398 S.E.2d at 463 (quotation marks and citation omitted); whether the employee acted "as a means or for the purpose of performing the work he was employed to do" or whether he "was advancing a completely personal objective," *id.* at 464; or whether an employee's act "was a means or method of doing that which he was employed to do" or whether he "departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do," *Wegner v. Delly-Land Delicatessen, Inc.*, 153 S.E.2d 804, 808 (N.C. 1967). We do not intend by this discussion to suggest any particular result from the application of this principle to the facts of this case. We merely observe that the inquiry is fact-bound and may involve consideration of such factors as the degree to which the physical confrontation in this case, if one occurred, represented an escalation of a work-related dispute and the degree to which it was motivated by personal animosity.

C

Because we conclude that material factual issues exist with respect to both the existence of the alleged assault and its nature, we find that the district court's decision to reject the United States' scope-of-employment certification was premature. Borneman must be held to his burden of proof, and the district court must resolve the material factual issues. We therefore remand this case for proceedings

consistent with the Maron/Gutierrez procedures outlined above.

Should the district court conclude, after resolving all material facts, that McCauley was not acting within the scope of his employment, McCauley must be resubstituted as the defendant in this case. But the district court may not thereafter remand the case to state court. Remand is precluded by the Attorney General's removal under 28U.S.C. § 2679(d). Also the district court should not dismiss it.[2] The district court's jurisdiction on removal authorizes it to try the case even though the federal interest has been eliminated, and at that stage in the proceedings, it should exercise its jurisdiction and try the case, applying North Carolina law. The court will have already become exposed to the merits of the case in adjudicating the scope-of-federal-employment question, and, for reasons of judicial economy, convenience, and fairness to the parties, it should then proceed to final judgment. *See Gutierrez*, 515 U.S. at 435-36 (plurality opinion); *cf. United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966). If, on the other hand, the district court concludes that McCauley was acting within the scope of his employment, he enjoys absolute immunity and the action becomes one against the United States under the Federal Tort Claims Act.[3]

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[2]We understand removal to be a forum selection procedure that of itself confers no jurisdiction. Rather, it depends on an independent ground for jurisdiction. Thus, when removal is conclusively allowed by 28 U.S.C. § 2679(d), remand is precluded, but the federal interest that serves as the basis for federal jurisdiction may be independently evaluated. In this case, federal jurisdiction is based on the fact that at the time of removal, a federal employee ostensibly in the scope of his employment with the United States was a party.

[3] The government moved for dismissal in the district court on the dual grounds that Borneman failed to satisfy the FTCA's administrative exhaustion requirement, see 28 U.S.C. § 2675(a), and that his claim is not cognizable under the FTCA, which specifically excludes any claim arising out of an assault or battery, § 28 U.S.C.§2680(h); *Talbert v. United States*, 932 F.2d 1064, 1066 (4th Cir. 1991). However, once the United States is substituted as defendant, the FTCA may not

IV

In light of our ruling on the merits and our belief, in any event, that the district court did not abuse its discretion in denying Borneman his attorneys fees, we affirm the district court's ruling in that regard.

V

In sum, we vacate the district court's remand order and its rulings finding erroneous the United States' certification and substitution. We affirm the district court's order denying Borneman's motion for attorneys fees. And we remand this case to the district court for further proceedings in accordance with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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apply at all if, as the record seems to indicate, Borneman's injuries were job-related injuries condensable under the Federal Employees Compensation Act (FECA). *See* 5 U.S.C. § 8102. In that case, FECA provides the exclusive remedy for a federal employee against the United States. *See* 5 U.S.C. § 8116(c); *Wallace v. United States*, 669 F.2d 947, 951 (4th Cir. 1982); *see also Ezekiel v. Michel*, 66 F.3d 894, 898-900 (7th Cir. 1995) (Westfall Act substitution makes FECA exclusive remedy); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 804-05 (11th Cir. 1989) (same).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

Entered October 8, 1998

No. 7:98-CV-97-F(1)

JOHN MICHAEL BORNEMAN,	)	
Plaintiff,	)	
v.	)	**ORDER**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This matter is before the court upon the Defendant's motion to dismiss and the Plaintiff's motion to remand. Both matters are ripe for disposition.

I.

This action was initiated by the Plaintiff, John Michael Borneman, against Richard P. McCauley in the Superior Court of New Hanover County, North Carolina, on May 8, 1998. The action against McCauley was based on the common-law torts of assault and battery. The Complaint alleges that both the Plaintiff and McCauley were employees at the Dogwood Annex Station Office of the United States Postal Service on May 9, 1997. The Plaintiff worked as a rural route carrier and as the local shop steward of the North Carolina Rural Carriers' Association; McCauley was acting in the capacity of customer services manager. The Plaintiff alleges that on May 9, 1997, he and McCauley argued and McCauley assaulted and battered the Plaintiff. Specifically, Plaintiff alleges that McCauley shouted obscenities at the Plaintiff, followed the Plaintiff down a hallway screaming at him, and then kicked the Plaintiff's feet out from under him and pushed him from behind causing the Plaintiff to fall

forward and severely injure his knee. McCauley has asserted through affidavit to this court that, after the verbal dispute between him and the Plaintiff, the Plaintiff was walking backwards down the hallway and fell backwards injuring his knee.

On June 9, 1998, the Office of the United States Attorney for the Eastern District of North Carolina filed a Notice of Removal to this court, Notice of Substitution of the Untied States as a party Defendant for McCauley, and a motion to dismiss Plaintiff's Complaint pursuant to FED.R.CIV.P. 12(b)(1) and (6). On July 13, 1998, the Plaintiff responded to the Defendant's motion to dismiss and filed a motion to remand this matter.

II. The Parties Contentions

The Defendant United States argues that Richard McCauley was acting within the scope of his employment on May 9, 1997 when he allegedly assaulted and battered the Plaintiff. Indeed, on June 9, 1998, pursuant to 28 U.S.C. § 2679 (d), the Attorney General, acting through the United States Attorney for the Eastern District of North Carolina, certified that McCauley was acting as an employee of the United States at the time of the conduct alleged in the Complaint. Because of such certification, the Defendant asserts that the provisions of the *Federal Tort Claims Act* (FTCA) apply to this action to render it as one against the United States, immunizing McCauley from personal liability. Furthermore, the Defendant argues that 28 U.S.C. § 2680 specifically excludes any claim arising out of an assault or battery from those tortuous acts for which the United States has allowed itself to be sued. Thus, because the United States is immune from suit arising from an assault and battery by a federal employee, Defendant argues that this matter must be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction.

Also, the United States argues that this court has no jurisdiction over the Plaintiff's claim as a result of 28 U.S.C §2675(a). Section 2675(a), in relevant part, states that:

> [a]n action shall not be instituted upon a claim against the United States for money damages for injury of loss... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C § 2675(a). The requirement of the filing of an administrative claim pursuant by 28 U.S.C. § 2675(a) is "jurisdictional and may not be waived." *Ahmed v. U.S.*, 30 F.3d 514 (4th Cir. 1994); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986). In this case, the Defendant argues that the Plaintiff has failed to exhaust his administrative remedies, and this matter must be dismissed.

The Plaintiff seeks to have this matter remanded to state court. The Plaintiff argues that certification of this action under § 2676(d) by the Attorney General was improper because McCauley was not acting within the scope of his employment when he assaulted and battered the Plaintiff. Thus, this action was not removable under 28 U.S.C. § 1441 because this court does not have subject matter jurisdiction over Plaintiff's tort suit, and the case should be remanded to state court pursuant to 29 U.S.C. 1447(c). Presumably because he argues that the provisions of the FTCA are inapplicable to this matter because McCauley was not acting within the scope of his employment, Plaintiff does not respond to Defendant's

argument that he has failed to exhaust his administrative remedies before bringing suit.

III.

A. FTCA Immunity for Federal Employees and Certification

The FTCA, as amended by the *Federal Employee Liability Reform and Tort Compensation Act* (FELRTCA), codified at 28 U.S.C. §§ 1346(b), 2671-80, immunized a federal employee from liability for his "negligent or wrongful act[s] or omission[s]...while acting within the scope of his office or employment..." 28 U.S.C. § 2679(b)(1). When a federal employee is sued, the United States Attorney, acting on behalf of the Attorney General, must certify whether that employee was in fact acting within the scope of his or her employment at the time of the alleged tortious act. *See* 28 U.S.C. 2679(d)(1).[1] Once this certification has been made, the United States is substituted as the sole defendant and all suits filed in state court are removed to federal court; then the plaintiff's sole route for recovery is the FTCA.

For many torts, the United States has not waived its sovereign immunity through the FTCA. Therefore, even if a

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[1]Section 2679(d)(1) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). Section 2679(d)(2) provides for removal of cases from state to federal court and substitution of the United States as the party defendant in those cases. *See id.* § 2679(d)(2)

claim is properly certified under § 2679(b)(1), the plaintiff cannot recover from the federal government despite the merits of his or her claim. *See, e.g.*, 28 U.S.C. 2680(h) (excluding claims arising from assault and battery); *see also Johnson v. Carter*, 983 F.2d 1316, 1323 (4th Cir. 1993) (dealing with defamation, for which the United States has not waived its sovereign immunity); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991) (stating that the United States cannot be sued for certain intentional torts). In cases where the United States has not waived its immunity, the United States must still be substituted and the individual defendant still remains immune from suit if the tort occurred within the scope of the federal employee's employment. A plaintiff, despite the seeming unfairness, cannot proceed against the individual defendant. *See United States v. Smith*, 449 U.S. 160, 195 (1991); *Johnson*, 983 F.2d at 1323-24; *Brown*, 949 F.2d at 1012-13.

B. Review of Certification Decision by Attorney General

At one time in this circuit, certification by the Attorney General that an act was within a federal employee's scope of employment was dispositive of the issue and not judicially reviewable. *See Johnson*. 983 F.2d at 1324. However in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), the United States Supreme Court held that certifications regarding the scope of employment were reviewable by a district court. *See id.* at 426. When a plaintiff challenges a scope of employment certification by the Attorney General, he bears the burden of proving by a preponderance of the evidence that the actions complained of were not within the scope of employment. *See Maron v. United States*, 126 F.3d 317, 322 (4th Cir. 1997). A district court reviews the certification *de novo*. *See id.* In order to decide the certification issue, the district court must apply the law of the state in which the tort occurred to determine if the federal employee was acting within the scope of his

employment. *See id.* at 324; *Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994).

D. Respondeat Superior Law in North Carolina

As a general rule, in North Carolina, an employer will be liable for its agent's wrongful act under the doctrine of respondeat superior when the agent's act is (1) expressly authorized by the employer; (2) committed within the scope of the agent's employment and in furtherance of the employer's business--when the act comes within his implied authority; or (3) ratified by the employer. *See Medlin v. Bass*, 398 S.E.2d 460, 463-64 (N.C. 1990). In this case, the parties do not contend that the United States expressly authorized or ratified McCauley's actions. Instead, the parties focus on the second method an employer will be liable for its employee's wrongful act-whether the act was within the scope of the employee's employment.

"To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Troxler v. Charter Mandala Center*, 365 S.E.2d 665, 668 (N.C. App.), *disc. review denied*, 371 S.E.2d 284 (1988). "If an employee departs from that purpose to accomplish a purpose of his own, the principal is not [vicariously] liable." *Id.* Furthermore, "intentional tortious acts are rarely considered to be within the scope of an employee's employment." *Brown v. Burlington Industries, Inc.*, 378 S.E.2d 232, 235 (N.C. App.), *disc. review allowed*, 384 S.E.2d 513, *cert granted*, 387 S.E.2d 55 (1989), *disc. review improvidently allowed*, 388 S.E.2d 769 (1990).

IV. In Scope of McCauley's Employment?

This court must now determine if the Plaintiff met his burden of showing, by a preponderance of the evidence, that

McCauley's behavior was not within the scope of his employment, and therefore, that certification by the Attorney General was in error. After reviewing the record, this court concludes that Plaintiff has shown McCauley was not acting within the scope of his employment when he allegedly assaulted and bettered the Plaintiff.

Plaintiff's affidavit alleges that he and McCauley had a verbal dispute on May 9, 1997. That the dispute occurred in the Post Office and that it arose form a misunderstanding about Plaintiff's activities as a union steward support the Attorney General's certification that McCauley was acting within the scope of his employment on that day. However, Plaintiff further alleges in his affidavit that after the verbal altercation, McCauley became "livid" and began shouting threatening obscenities at the Plaintiff. Then, Plaintiff alleges that McCauley kicked Plaintiff's feet out from under him simultaneously pushing him forward; and as a result of McCauley's kick and shove, the Plaintiff fell and severely injured his knee. Plaintiff also has provided a letter form Plaintiff's treating physician which indicates that the "greatest likelihood of mechanism" of Plaintiff's injury was a forward fall (which contradicts McCauley's assertion that the Plaintiff fell backwards while walking backwards down the hall).

As the North Carolina courts have explained, an intentional tort, such as assault and battery, rarely will be within the scope of an employee's employment. *See Brown*, 378 S.E.2d at 235. To be within the scope of employment, an employee, at the time of the intentional tort must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment. *See Troxler*, 365 S.E.2d at 668. For example, the employer of a bouncer in a bar may in some circumstance be held vicariously liable for an intentional tort committed by the bouncer in removing a rowdy patron from the bar. In this case, however, the United States has not suggested any means by which McCauley's alleged intentional tort

furthered the Post Office's business. Thus, this court finds that McCauley's tortuous act was not committed in the scope of his employment.

Because this court finds that McCauley was not acting within the scope of his employment when he allegedly assaulted and battered the Plaintiff, the court concludes that certification by the Attorney General was erroneous. Accordingly, substitution of the United States as the Defendant in this matter was also erroneous. Because this court lacks jurisdiction over this common-law intentional tort claim, removal of the action was improper. This matter, therefore, is REMANDED to the Superior Court of New Hanover County, North Carolina.

V. Conclusions

For the foregoing reasons, Plaintiff motion for remand is ALLOWED, and this matter is REMANDED pursuant to 28 U.S.C. 1447(c). The Defendant's motion to dismiss pursuant to FED.R.CIV.P. 12(b)(1) and (6), and 28 U.S.C. §§ 2680(h), 2765(a) is DENIED.

SO ORDERED.

This the 15th day of October, 1998.

\s\James C. Fox
James C. Fox
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

Entered January 06, 1999

No. 7:98-CV-97-F(1)

JOHN MICHAEL BORNEMAN,)
Plaintiff,)
v.) **ORDER**
UNITED STATES OF AMERICA,)
Defendant.)

This matter is before the court upon the Defendant's motion for reconsideration, pursuant to FED.R.CIV.P. 59(e), of this court's October 16, 1998 order. The Plaintiff has responded to the motion for reconsideration, and the Defendant has replied. The court also has considered a supplemental memorandum filed by the Plaintiff, and a reply thereto filed by the Government. The matter is ripe for disposition.

I.

This action was initiated by the Plaintiff, John Michael Borneman, against Richard P. McCauley in the Superior Court of New Hanover County, North Carolina, on May 8, 1998. The action against McCauley was based on the common-law torts of assault and battery. The Complaint alleges that both the Plaintiff and McCauley were employees at the Dogwood Annex Station Office of the United States Postal Service on May 9, 1997, and that McCauley assaulted and battered the Plaintiff on that day. On June 9, 19989, the Office of the United States Attorney for the Eastern District of North Carolina filed a notice of Removal to this court, Notice of Substitution of the United States as a party

Defendant for McCauley, and a motion to dismiss Plaintiff's Complaint pursuant to FED.R.CIV.P. 12(b)(1) and (6). On July 13, 1998, the Plaintiff responded to the Defendant's motion to dismiss and filed a motion to remand this matter. The Defendant responded to the motion to remand, and the parties filed affidavits of McCauley and the Plaintiff.

In their motion to dismiss, the Defendant United States argued that Richard McCauley was acting within the scope of his employment, when he allegedly assaulted and battered the Plaintiff. The United States argued that pursuant to 28 U.S.C. § 2679(d)-the Westfall Act-the Attorney General, acting through the United States Attorney for the Eastern District of North Carolina, certified that McCauley was acting as an employee of the United States at the time of the conduct alleged in the Complaint. Because of such certification, the Defendant asserted that the provisions of the *Federal Tort Claims Act* (FTCA) applied to this action to render it as one against the United States, immunizing McCauley from personal liability.

In his motion to remand, the Plaintiff argued that certification of this action under § 2679(d) by the Attorney General was improper because McCauley was not acting within the scope of his employment under North Carolina *respondeat superior* law when he allegedly assaulted and battered the Plaintiff. Plaintiff argued that this action was not removable under 28 U.S.C. § 1441 because this court did not have subject matter jurisdiction over Plaintiff's common-law tort suit. Thus, Plaintiff asserted that the case should be remanded to state court pursuant to 28 U.S.C. § 1447(c). This court agreed with the Plaintiff that McCauley was not acting within the scope of his employment, and by order of October 16, 1998, remanded this action to state court citing 28 U.S.C. 1447(c) and specifically finding that it did not have subject matter jurisdiction over this matter.

The Defendant now seeks reconsideration of this court's order. Defendant requests that this court conduct an evidentiary hearing before ruling on the scope of

employment issue. In the alternative, the Defendant asks this court to amend its findings and conclusions to hold that McCauley was acting within the scope of his employment. Citing 28 U.S.C. § 1447(d), the Plaintiff asserts that this court does not have jurisdiction to reconsider its decision to remand this action.

II. FED.R.CIV.P. 59(e) Standard

Although FED.R.CIV.P. 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, the Court of Appeals for the Fourth Circuit has recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997); *Collison v. Internat'l Chem. Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). The rule permits a district court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). However, FED.R.CIV.P. 59(e) motions may not be used to raise arguments that could have been raised prior to the issuance of the judgment or to argue a case under a novel legal theory that the party had the ability to address in the first instance. *See Russell,* 51 F.3d at 749; *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990); *see also*, 11 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2810.1 at 127-28 (2d ed. 1995) ("The Rule 59(e) motion may not be used to relitigate old maters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."). In general, "reconsideration of a judgment after its entry is an

extraordinary remedy which should be used sparingly." WRIGHT E T AL., *supra,* § 28101.1, at 124.

III. § 1447(d)

The Plaintiff argues that § 1447(d) bars this court from considering Defendant's motion to reconsider its October 16, 1998, order. Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," subject to an exception for civil rights cases that is not applicable here. On its face, § 1447(d) appears to prevent review, appellate or by this court on motion for reconsideration, of all remand orders regardless of the basis. However, the Supreme Court has declined to give § 1447(d) such a literal meaning holding instead that it insulates only those remand orders are based on grounds specified in 28 U.S.C. § 1447(c). *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Section 1447(c) mentions only two ground for remand: a defect in removal procedure and a lack of subject matter jurisdiction in the federal court. The parties have alleged no defect in removal procedure. Instead, the parties focus on whether this court's remand order was based on a finding of a lack of subject matter jurisdiction.

Citing *Jamison v. Wiley*, 14 F.3d 222, 231-34 (4th Cir. 1994) and *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), the Defendant argues that this court has authority to review its remand order. In *Jamison*, the Court of Appeals for the Fourth Circuit held that it could review a district court order remanding an action to state court because the remand order could not "fairly be characterized as one that was based on" a lack of subject matter jurisdiction. *Jamison*, 14 F.3d at 232. The Fourth Circuit noted that the district court's remand order did not cite § 1447(c) or specifically mention "'jurisdiction'-or lack thereof-at all". *Id.*. Additionally, the district court in *Jamison* believed that the "source of its removal jurisdiction

was § 1442(a)(1)"-not the Westfall Act. Unlike the Westfall Act, § 1442(a)(1) does not condition the right to removal on a finding that a defendant acted within the scope of his federal employment; instead § 1442(a)(1) permits "[a}ny officer of the United States, or any...person acting under him," to remove any action brought against him in a state court "for any act *under color of such office*." § 1442(a)(1) (emphasis added). By raising a "colorable" federal defense under § 1442(a)(1), a defendant-official transforms an otherwise nonremovable state-law action into one that falls under a federal court's "arising under" jurisdiction. *See Jamison*, 14 F.3d at 239 (citations omitted). Thus, even if the federal court ultimately rejects the federal defense that supported removal under § 1442(a)(1), the court retains subject matter jurisdiction over the removed action. *See id.* (noting that § 1442(a) "creates exception to 'well-pleaded complaint' rule which makes officer's assertion of federal defense adequate to confer federal question jurisdiction."). Because the *Jamison* district court's remand order did not cite § 1447(c), did not mention jurisdiction, and assumed that removal was based on § 1442(a)(1), the Fourth Circuit found that § 1447(d)'s prohibitions were inapplicable and that it had authority to review the district court's remand order. *See id.; se also Mangold*, 77 F.3d at 1451 (finding that when remand was not ordered pursuant to a motion to remand nor on "an assumption that there was a 'lack of jurisdiction' so that remand was *compelled,"* § 1447(d) did not bar review of remand order).

This case is quite distinguishable from *Jamison* and *Mangold*. Unlike *Jamison* and *Mangold*, this court cited § 1447(c) as the basis of its remand order. Furthermore, this court specifically stated in its October 16, 1998, order: "Because this court lacks *jurisdiction* over this common-law tort claim, removal of the action was improper." *See* Order, at 8 (emphasis added). Furthermore, this court never assumed, *and the Defendant never argued*, that removal of this action was based on § 1442(a)(1), which would have

conferred subject matter jurisdiction on the court despite the court's holding that McCauley was not acting within the scope of his employment pursuant to the Westfall Act. To the extent, if any, that the Defendant attempts to assert in its reply brief to its motion to reconsider, that this court had subject matter jurisdiction under over this action because of 1442(a)(1), the undersigned will not consider Defendant's untimely argument. *See Russell*, 51 F.3d at 749: *Simon v. United States*, 891 F.2d at 1159; 11 WRIGHT ET AL., § 2810.1, at 127-128.

Because § 1447(d) prevents this court from reviewing a remand order based on § 1447(c) in which this court finds it does not have subject matter jurisdiction, *see Jamison*, 14 F.3d at 231-33; *Mitchell v. Carlson*, 896 F.2d 128, 133 (5th Cir. 1990) (holding § 1447(d) applied to bar review of remand order in Westfall Act case when district court expressly stated that it lacked subject matter jurisdiction over the removed action); *Three J Farms v. Alton Box Board Co.*, 609 F.2d 112, 115-16 (4th Cir. 1979 (applying § 1447(d) when district court's order of remand "clearly determined that there was an absence of federal jurisdiction"), the Defendant's motion for reconsideration is DENIED.

SO ORDERED.

This the 6th day of January, 1999.

\s\ James C. Fox
James C. Fox
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

Entered March 03, 1999

No. 7:98-CV-97-F(1)

JOHN MICHAEL BORNEMAN,	)	
Plaintiff,	)	
v.	)	**ORDER**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This matter is before the court upon the Plaintiff's motion for costs and attorneys' fees pursuant to 28 U.S.C. § 1447(c) incurred as a result of the removal of this action. The Defendant has responded, and the matter is ripe for disposition.

The decision by a district court to award costs and attorneys' fees pursuant to 28 U.S.C. § 1447(c) is discretionary.. *See* C. WRIGHT, A. MILLER & E. COOPER, 14A FEDERAL PRACTICE AND PROCEDURE § 3739 (3d ed. 1998). In this case, the court finds that the Defendant did not act improvidently or in bad faith in removing this action. Thus, this court refuses to award costs and attorney's fees to the Plaintiff. *See ITT Indus. Credit Co. v. Durango Crushers, Inc.*, 832 F.2d 307, 308 (4th Cir. 1987) (affirming award of sanctions when the removal petition was patently without merit leading to the conclusion that removal was undertaken in bad faith); *Griffin v. Holmes*, 843 F.Supp. 81 (E.D.N.C. 1993) (denying motion for costs and attorneys' fees upon a finding of good faith removal); *Marler v. Amoco Oil Co., Inc.*, 793 F.Supp 656 (E.D.NC. 1992) (same).

Therefore, Plaintiff's motion for costs and attorneys' fees hereby is DENIED.

SO ORDERED.
This the 3rd day of March, 1999.

\s\ James C. Fox
James C. Fox
United States District Judge

28 § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) I may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 §2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1235(b) of this title, and remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the Untied States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government ---

(A) which is brought for a violation of the Constitution of the United States, or

(B) Which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an

attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting with the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes or removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be

deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such claim shall be deemed to be timely presented under section 2401(b) of this title if ---

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.